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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights

**Report submitted by the Special Rapporteur on toxic waste,
Mrs. Fatma-Zohra Ouhachi-Vesely**

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Summary

This report is being submitted in accordance with resolutions 1995/81, 1996/14, 1997/9, 1998/12, 1999/23 and 2000/72 of the Commission on Human Rights. The Special Rapporteur has already submitted a preliminary report (E/CN.4/1996/17) and reports on her activities (E/CN.4/1997/19, E/CN.4/1998/10 and Add.1, E/CN.4/1999/46 and E/CN.4/2000/50). She has visited Africa, South America and Europe. In 1997 she visited South Africa, Kenya and Ethiopia (E/CN.4/1998/10/Add.2); in 1998 Paraguay, Brazil, Costa Rica and Mexico (E/CN.4/1999/46/Add.1); and in 1999 the Netherlands and Germany (E/CN.4/2000/50/Add.1). She made no field visits in 2000.

This report consists of six chapters dealing with the activities of the Special Rapporteur (chap. I), relevant instruments and standards (chap. II), trends in and characteristics of illicit traffic (chap. III), transnational corporations (chap. IV), human rights impacts (chap. V), and conclusions and recommendations (chap. VI). The main report is supplemented by an addendum (in English only) listing the general comments communicated to the Special Rapporteur (chap. I) and new cases received (chap. II). The bulk of the addendum consists of a summary of the cases submitted since the beginning of the Special Rapporteur's mandate; these have been numbered in order to facilitate identification and reference (chap. III, paras. 15 to 129).

A study of trends shows that there has been an increase in exports of dangerous products and wastes from industrialized countries to the third world via "recycling" programmes, which enable producers to circumvent the ban imposed by the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The supervised implementation of the Basel amendment, which prohibits exports for recycling purposes, should help to reduce major transfers of wastes from States members of the Organization for Economic Cooperation and Development (OECD) to non-member States.

However, the transfer of polluting industries, industrial activities and technologies that generate dangerous wastes is another aspect of the problem. Prohibited exports are disposed of as recycling material or under cover of bogus development projects. The transfer of "dirty" industrial operations from OECD member States to non-member States has apparently increased. The export of contaminated ships for shipbreaking is a new aspect of waste trafficking. Products which are either banned or strictly regulated in industrialized countries continue to be produced and exported to developing countries. The most alarming cases involve the intensive and uncontrolled use of chemicals, toxic agricultural products and persistent organic pollutants (POPs). The stockpiling of obsolete chemicals in developing countries is a major cause of concern.

Traffickers in wastes resort to fraudulent practices and even corruption. Corporations make use of front companies. In at least one case, humanitarian aid apparently served as a cover for the attempted export of hazardous products from a rich to a poor country. In other cases, transfers have been linked to the trafficking in weapons, nuclear material or drugs, suggesting that there exist international trafficking networks with dangerous ramifications.

A combination of legal, economic, social and political factors is contributing to the emergence, development and intractability of the problem. These include the disparity between

the standards applied in different countries; the absence of effective international regulatory mechanisms; the ambiguities in international instruments and the difficulties experienced by developing countries which lack the necessary resources to apply domestic and international legislation; and the liberalization of trade and the deregulation of international financial markets and the economies of developing countries.

The communications received by the Special Rapporteur highlight the negative impact of such practices on the fundamental human rights enshrined in the Universal Declaration of Human Rights and the International Covenants of 1966, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Declaration on the Right to Development, and the Declaration on Human Rights Defenders.

The cases and incidents which have been brought to the Special Rapporteur's attention constitute a record of violations of the exercise and enjoyment of basic rights such as the right of peoples to self-determination and permanent sovereignty over national resources; the right to development, the rights to life, health, an adequate standard of living and sufficient food, safe and healthy working conditions, housing, information, participation, and freedom of association; the right to enjoy the benefits of scientific progress and its applications; trade union rights; the right to strike; the right to bargain collectively; and the right to social security.

Reference is made to numerous examples of violations of the right to life, health, and safe and healthy working conditions; racism; discrimination; and breaches of the rights of migrant workers, minorities and indigenous peoples, of the rights to freedom of association and freedom of information; and of the rights of human rights defenders. The Opinion of the Working Group on Arbitrary Detention dated 20 May 1999, namely that the freedom to make environmental criticism is part of the freedom of expression, is also cited.

The question of impunity and that of the rights of victims merit further study. The transboundary nature of the problem, with transnational corporations resorting to fraudulent practices, shell companies and corruption, is a complicating factor. It is difficult to trace the origin of products, to apportion blame, to establish a causal link between the offence and the injury, or to identify the victims. Given the lack of acknowledged provisions regarding the concept of corporate liability, it is practically impossible to bring a successful prosecution against a corporation. The codification work being undertaken by United Nations bodies should continue, and defence of the rights of victims, including their procedural rights and rights relating to breach of the right to a healthy environment, must be assured.

In her recommendations, the Special Rapporteur refers to the appeal made in the Vienna Declaration and Programme of Action and the objectives of Agenda 21.

The ban imposed by the amendment to the Basel Convention will remain ineffectual unless it is backed up by concrete measures to detect illicit practices and combat new transfer patterns. International conventions need to be ratified. The draft convention on POPs should be finalized as soon as possible.

Domestic and international regulations would be ineffectual without effective control and implementation mechanisms. The promulgation of stringent national laws should continue, particularly in developing countries. These countries' capacity needs to be strengthened through financial assistance, technology transfer, provision of laboratory equipment, assistance in setting up national databases, the establishment of regional and international data and information exchange centres, assistance in the educational sphere, and training for professionals in the areas of health care, environment, trade, customs, the police, anti-fraud operations and the judicial system.

Mutual legal assistance and exchange of information should be facilitated to counteract fraud and corruption in producer countries, importing countries, and transit countries alike. Regional and international cooperation in combating organized trafficking networks should be encouraged.

Governments should pass legislation that prevents the scourge of illicit trafficking and includes deterrent measures, including administrative, civil and criminal penalties for individuals, enterprises and transnational corporations involved in this trade.

Transnational entities must comply with the laws of the importing country, and when necessary should be held accountable for their actions under the law of their home country if its standards and regulations are stricter. Victims should have access to administrative and judicial proceedings in the exporting State. National model laws and regional arrangements could be proposed to Governments which so wish.

The Special Rapporteur calls for a code of conduct to be elaborated for transnational corporations on the basis of human rights standards and the nine principles of the global compact for human rights, labour and the environment proposed by the Secretary-General.

Human rights bodies must deal with rights violations associated with the activities of multinational corporations, toxic wastes and other environmental problems. Supervisory mechanisms should be strengthened and codification efforts continued.

Independent national commissions of inquiry endowed with judicial or quasi-judicial powers should be established in alleged cases of illicit transfer or attempted illicit dumping.

The role of non-governmental organizations (NGOs), local communities and associations, trade unions, workers and victims should be strengthened. Freedom of expression, the right of association and effective legal remedies should be consolidated.

Introduction

1. In 1995, at its fifty-first session, the Commission on Human Rights adopted its first resolution specifically concerning the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (resolution 1995/81, confirmed by Economic and Social Council decision 1995/288 of 25 July 1995). The Commission noted with grave concern that the increasing rate of illicit dumping of toxic and dangerous products and wastes in developing countries continued adversely to affect the human rights to life and health, and decided to appoint a special rapporteur with a mandate (a) to investigate and examine the effect on the enjoyment of human rights; (b) to investigate, monitor, examine and receive communications and gather information on the subject; (c) to make recommendations and proposals on measures to control, reduce and eradicate illicit traffic and dumping; and (d) to compile a list of the countries and transnational corporations engaged in such practices, in addition to a list of victims.

2. Pursuant to that resolution, Mrs. Fatma-Zohra Ksentini (at present Ms. Ouhachi-Vesely) (Algeria) was appointed Special Rapporteur. The Commission has since approved a resolution each year on the dumping of toxic wastes (1996/14, 1997/9, 1998/12, 1999/23 and 2000/72). In 1998 the mandate of the Special Rapporteur was renewed for a further period of three years. Pursuant to the above-mentioned resolutions, the Special Rapporteur has submitted a preliminary report (E/CN.4/1996/17) and progress reports (E/CN.4/1997/19, E/CN.4/1998/10 and Add.1, E/CN.4/1999/46 and E/CN.4/2000/50 and Add.1). She has also visited Africa, South America and Europe: in 1997, she visited South Africa, Kenya and Ethiopia (see E/CN.4/1998/10/Add.2); in 1998, Paraguay, Brazil, Costa Rica and Mexico (see E/CN.4/1999/46/Add.1); and in 1999, the Netherlands and Germany (see E/CN.4/2000/50/Add.1).

3. In its resolution 2000/72 of 26 April 2000, the Commission invited the Special Rapporteur to include in her report (a) comprehensive information on persons killed, maimed or otherwise injured in developing countries as a result of the illicit dumping of toxic products; (b) the question of the impunity of the perpetrators of these heinous crimes, including racially motivated discriminatory practices, and recommendations regarding measures to end impunity; (c) the question of rehabilitation and assistance to victims; and (d) the scope of national legislation in relation to the transboundary movement and dumping of toxic and dangerous products and wastes.

4. This report consists of five main chapters dealing with (a) the activities of the Special Rapporteur; (b) relevant instruments and standards; (c) trends in and characteristics of illicit traffic; (d) transnational corporations; (e) the impact on the enjoyment of human rights, especially the question of impunity and victims' right to compensation; and (e) conclusions and recommendations. The main report is supplemented by an addendum (in English only) consisting of three chapters: general comments communicated to the Special Rapporteur (chap. I); new cases received (chap. II); and a summary of the cases submitted since the beginning of the Special Rapporteur's mandate, numbered, as they will be from now on, in order to facilitate identification and reference (chap. III, paras. 15 to 129). A list of victims in the United States of America/Paraguay-Delta Pine case is provided in an annex.

I. ACTIVITIES OF THE SPECIAL RAPPORTEUR

A. Missions

5. In 2000 the Special Rapporteur had planned to visit the Asia-Pacific region, North America, and possibly certain countries in Europe. In the event, she was unable to make any field visits. Most of the Governments which she contacted with a view to organizing a visit expressed their willingness to cooperate and stated that they were prepared to make preparations for a possible visit. China and India are continuing to study proposals. Australia and Japan have sent documentation which they consider appropriate. The Special Rapporteur believes that, while such material may be useful in preparing visits, it can never be a substitute for the visits themselves. In a second letter dated 10 November 2000, transmitted through the Office of the United Nations High Commissioner for Human Rights on 14 November and received by the Special Rapporteur on 17 November, the Japanese Government stated that it was prepared to facilitate a regional visit and to provide additional information to that end. In its letter of 2 October 2000, sent to the Office of the High Commissioner on 3 November and forwarded to the Special Rapporteur on 6 November, the Government of the United Kingdom requested further details. In a letter dated 22 November, sent to the Office of the High Commissioner on 28 November and received on 31 November, the Government of the United States of America stated that it would welcome a visit but proposed dates (early January or February) which, in the view of the secretariat, would not have left enough time to draft a report to the Commission. The United States Government also drew the Special Rapporteur's attention to the fact that she would be unable to meet senior officials and members of Congress during the country's period of transition to a new Administration. The secretariat therefore took the view that there was little point in making arrangements for a visit. Accordingly, the Special Rapporteur has decided to accept the proposal of the United States Government that the visit be postponed until mid-May 2001.

B. Meetings

6. On 6 April 2000, during her visit to Geneva to present her report to the Commission on Human Rights, the Special Rapporteur took part in a meeting of special rapporteurs and independent experts in the field of economic, social and cultural rights and the right to development and representatives of treaty bodies and the United Nations organizations, in order to improve the collaboration between the special mechanisms and the agencies of the United Nations system. At this meeting, the Special Rapporteur gave an oral presentation on the problems of development, human rights and the environment, and took the opportunity to raise her listeners' awareness of the content of her mandate in respect of toxic products and the input she expected from the specialized agencies. She also organized consultations with NGOs.

7. The Special Rapporteur took part in the 7th meeting of special rapporteurs held in Geneva from 5-9 June 2000. On 8 June, she held a working meeting with NGOs at the Palais des Nations. She has been invited to take part in the First Continental Conference for Africa on the Environmentally Sound Management of Unwanted Stocks of Hazardous Wastes and their Prevention, convened by the secretariat of the Basel Convention at Rabat from 8-12 January 2001.

C. Difficulties encountered in fulfilment of the mandate

8. In her previous reports the Special Rapporteur has made a point of drawing attention to the problems which have arisen in the execution of her mandate. For the third time now, without any explanation or prior consultation, she has been allocated a new assistant, thereby depriving her of the continuity of the services which are necessary for the trouble-free execution of her mandate. Although the Office of the High Commissioner has sought to minimize the destabilizing effects of these unwelcome changes, the Special Rapporteur must emphasize that she has been unable to avail herself of the full range of administrative services and resources necessary to carry out the studies and analyses requested by the Commission, and this despite the Commission's repeated requests to the Secretary-General to provide the Special Rapporteur with whatever resources she needs to carry out her mandate successfully, and in particular to provide her with adequate financial and human resources, including administrative support.

II. RELEVANT INSTRUMENTS AND STANDARDS

9. The following four sections sum up the information contained in previous reports, which may be consulted if necessary.

A. Directly relevant international instruments

10. The principal international treaties of direct relevance are:

(1) The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989, entered into force 5 May 1992; 130 States parties in July 1999);

(2) The Amendment to the Convention (adopted 22 September 1995; 21 ratifications, with 62 needed for entry into force);

(3) The Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (adopted 10 December 1999);

(4) The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (adopted 10 September 1998; 11 ratifications, with 50 needed for entry into force);

(5) The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement of and Management of all Forms of Hazardous Wastes within Africa (adopted 30 June 1991);

(6) The Regional Agreement on the Transboundary Movement of Dangerous Wastes (Panama City) (adopted 11 December 1992);

(7) The Council of Europe Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment (adopted at Lugano on 21 June 1993, opened for signature in 1998);

(8) The Convention for the protection of the environment through criminal law (adopted at Strasbourg on 4 November 1998, no ratifications by October 2000);

(9) The Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (elaborated under the auspices of the International Atomic Energy Agency (IAEA), opened for signature on 29 September 1997);

(10) The IAEA Code of Practice on the International Transboundary Movement of Radioactive Waste (21 September 1990).

B. Other relevant principles and instruments

11. The following instruments are also relevant:

(1) General principles of international law, including the principle of sic utere tuo ut alienum non laedas;

(2) General principles concerning the international law of the environment, including the polluter-pays principle;

(3) The Stockholm Declaration of the United Nations Conference on the Human Environment (1972), especially principles 1, 6, 7, 11, 21, 22, 24 and 26;

(4) The Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974);

(5) The World Charter for Nature (General Assembly resolution 37/7 of 28 October 1982, especially principles 11, 15, 23 and 24);

(6) Documents of the United Nations Conference on Environment and Development, including Agenda 21 and the Rio Declaration on Environment and Development, especially principles 1-5, 10, 11, 13-15, 18-20, and 22-25).

C. Human rights standards

12. Reference should also be made to general human rights standards and various other human rights instruments.

General standards

(a) The Charter of the United Nations, Articles 55 and 56;

(b) The Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960);

(c) General Assembly resolution 1803 (XVII) of 14 December 1962 (Permanent sovereignty over natural resources);

(d) The Declaration on Social Progress and Development (General Assembly resolution 2542 (XXIV) of 11 December 1969;

(e) The Charter of Economic Rights and Duties of States (General Assembly resolution 3281 (XXIX) of 12 December 1974);

(f) The Declaration and Programme of Action on the Establishment of a New International Economic Order (General Assembly resolutions 3201 (S-VI) and 3202 (S-VI) of 1 May 1974);

(g) The World Declaration on Nutrition and the Plan of Action for Nutrition adopted by the International Conference on Nutrition (United Nations Food and Agriculture Organization (FAO), Rome 1992);

(h) The Copenhagen Declaration on Social Development and the Programme of Action of the World Summit for Social Development (Copenhagen, 6-12 March 1995), especially Commitment 4 of the Declaration;[1]

(i) Documents of the World Conference on Human Rights (1993), especially the Vienna Declaration and Programme of Action.

Human rights instruments

(a) Universal Declaration of Human Rights (1948), especially article 2 (non-discrimination); article 3 (right to life, liberty and security of person); article 7 (right to equality before the law); article 8 (right to an effective remedy in the courts of law); article 9 (prohibition of arbitrary arrest); article 12 (protection against arbitrary interference); article 17 (the right to own property); and articles 18-23 and 28;

(b) The International Covenant on Economic, Social and Cultural Rights;

(c) The International Covenant on Civil and Political Rights;

(d) The International Convention on the Elimination of All Forms of Racial Discrimination;

(e) The Convention on the Elimination of All Forms of Discrimination against Women;

(f) The Convention on the Rights of the Child;

(g) The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

(h) Various conventions of the International Labour Organization (ILO), namely the Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise, 1948; the Convention (No. 98) concerning the Application of the Right to Organise and to Bargain Collectively, 1949; and the Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 1989;

(i) The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, especially principle 10 on the right to restitution and restoration in cases of substantial harm to the environment;

(j) The Declaration on the Right to Development;

(k) The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

D. National legislation

13. In her previous reports, the Special Rapporteur provided regular updates on the development of national legislation and domestic measures to combat illicit traffic when summarizing information supplied by Governments. Field visit reports also outline developments based on the experiences of the countries visited. Human resources constraints and limitations on document length preclude more detailed studies or an overview of the question. Consequently, the two reports cited in paragraph 2 above should be consulted.

III. TRENDS IN AND CHARACTERISTICS OF ILLICIT TRAFFIC

A. Facts and figures

1. Background

14. In the 1970s, increased generation of hazardous wastes and growing public awareness of their effects induced many industrialized countries to regulate the treatment of wastes. By the early 1980s, OECD member States were together generating 300 million tons of waste annually, which were becoming increasingly difficult and costly to dispose of.[2] Disparities in domestic legal standards and the costs of disposing of toxic wastes provoked multiple movements of wastes across frontiers. In 1983, 15 per cent of the world's hazardous wastes, some 45 million tons, was disposed of outside the generating country; at that time, most of the waste trade took place among OECD countries. In 1989, the United Nations Environment Programme (UNEP) estimated that approximately 20 per cent of the hazardous wastes generated in and exported from industrialized countries were being shipped to developing countries.

15. In 1984, when 41 barrels of dioxin from Seveso were reported lost, OECD issued a directive requiring member countries to adopt national legislation to monitor inter-State shipments of wastes, followed by a further directive in June 1986 on waste exports from the OECD zone. The European Economic Community adopted the same set of principles in 1984 and 1986 respectively.

16. In 1980, 80 per cent of the trade in hazardous wastes was between developed countries.[3] In 1988, between 2 and 2.5 million tons of waste were transported among the European members of OECD. It was only in 1986 that a North-South trend emerged. Greenpeace has pointed out that, between 1986 and 1988, over 6 million tons of hazardous waste were exported to developing countries and the countries of Eastern Europe, particularly Romania and Hungary.[4] Of the 100 to 300 million tons of waste produced each year by the developed countries, some 50 million were shipped to Africa.[5]

17. While the local capacity for hazardous waste storage and elimination in the developed countries was declining, the volume of waste produced continued to rise. Thus, the European Union was reported to have the capacity to eliminate an estimated 10 million tons of waste whereas it produced as much as 30 million tons a year.[6]

18. In 1987 and 1988 the existence of contracts between Western companies and African countries came to light. Under these contracts, the companies paid African countries ridiculously low sums for land on which to dump toxic waste.[7] According to a fact-file compiled by Centre Europe-Tiers Monde (CETIM), at least 15 African countries were targeted between 1986 and 1988: (a) South Africa (1986, from the United States, 20 tons of mercury waste a year; (b) Zimbabwe (1986, from the United States, 7,000 litres of waste); (c) Nigeria (1987-1988, from Italy, 4,000 tons dumped at Koko); (d) Djibouti (February 1987, 2,000 tons of waste delivered from Italy by the vessel Jelly Wax, subsequently returned); (e) Benin (January 1988, contract to deliver waste from Europe and the United States cancelled); (f) Gabon (January 1988, contract relating to a French nuclear waste storage project suspended); (g) Guinea (February 1988, 15,000 tons of waste from Philadelphia, United States dumped at Kassa); (h) the Congo (April 1988, contract to deliver waste from Europe and the United States cancelled); (i) Equatorial Guinea (May 1988, contract for European waste suspended); (j) Guinea-Bissau (June 1988, contract for European waste cancelled); (k) Senegal (June 1988, contract to deliver waste from Europe and the United States suspended); (l) Liberia (June 1988, waste from Europe returned); (m) the Gambia (July 1988, contract concerning waste from the United States cancelled); (n) Sierra Leone (July 1988, 625 sacks from Europe discovered near Freetown); (o) Angola (November 1988, contract concerning waste from Europe and the United States suspended).[8]

19. In this context, the Council of Ministers of the Organization of African Unity adopted its resolution 1153 (XLVIII) of 25 May 1998, which described dumping of this nature to be a crime against Africa and the African people. Similarly, on 7 December 1988, the United Nations General Assembly, in its resolution 43/75 ("Dumping of radioactive wastes"), condemned the dumping of nuclear and industrial wastes in Africa.

20. Simultaneously, the developing countries engaged in the drafting of a convention to regulate the transboundary movement of hazardous wastes in order fully to implement the principles already developed at the United Nations Conference on the Human Environment (Stockholm 1972) and by UNEP.[9]

21. The 1989 Basel Convention was the outcome of a compromise between the advocates of a complete ban on transboundary movements of wastes and those who wished to define the legal framework and conditions for the international transfer of wastes. It marked a step forward in

the assumption of responsibility for the problem, although it was considered inadequate by many countries, particularly those in Africa which adopted the Bamako Convention on the Banning of the Import into Africa and the Control of the Transboundary Movement of Hazardous Wastes within Africa on 29 January 1991.[10] At their 3rd meeting in 1995, the States parties to the Basel Convention adopted an amendment to the Convention banning exports of hazardous wastes, including those destined for recycling, from OECD to non-OECD countries. The comprehensive ban came into force in 1997.

2. Characteristics of illicit traffic

22. The movement of hazardous wastes and products to developing countries has continued; there has been a constant growth in waste production in industrialized countries and a proliferation of waste "recycling" programmes.[11] With the development of stricter international regulation and national legislation, illicit traffic has evolved, adapting to the new circumstances and taking on various forms and characteristics which are analysed in the four sections below.

(a) Dumping of hazardous wastes for disposal or storage

23. In the industrialized countries, the classic disposal options, namely land filling and incineration, are being subjected to restrictions, bans or phase-outs, whence the increase in the pressure to export such wastes to poor and remote areas. Between 1986 and 1988 alone, more than 3.6 million tons of waste shipments were made from OECD countries to non-OECD countries.[12]

(b) Trade in hazardous wastes for recycling or further use

24. In the past decade, there has been an increase in the movement from industrialized countries to developing countries of hazardous wastes destined for recycling or recovery operations. According to a UNEP report, "95 per cent of the hazardous wastes subject to transboundary movement between OECD and non-OECD countries are destined for recovery operations". However, "the frequency and quantity of hazardous wastes exported for final disposal are not likely to continue to increase significantly".[13] These movements are a cover for bogus "recycling", "further use", or hazardous recycling operations.

(i) Bogus recycling

25. Since recycling is defined as "further use", it can be used as a pretext for exporting hazardous wastes, particularly to poor countries, for energy production, as road-building or construction material or as fertilizer.

(ii) Hazardous recycling operations

Incineration plants

26. Incineration plants are often promoted and sold to poor countries as waste-to-energy plants that will produce free energy. In a 1989 report to the General Assembly,[14] the

Secretary-General drew attention to "the growth in the number of proposals from the industrialized countries to construct in the developing countries so-called waste-to-energy plants or provide supposedly non-hazardous waste landfill or incineration facilities."

27. Incineration processes reduce waste volumes by 70 to 90 per cent, but do not constitute a final disposal method. Even in ideal conditions, incineration generates toxic emissions and residues which are frequently more toxic than the original materials. Waste-to-energy plants discharge high levels of mercury and other heavy metals into the atmosphere. Incineration or reprocessing of toxic wastes causes new hazards. The ashes also have to be disposed of. If disposed of in a landfill, there is a risk of contamination of groundwater and drinking water supplies. Moreover, the filters and scrubbers fitted to the incinerator must also be disposed of, and they too are a source of contamination.

Lead recycling factories

28. The lead battery industry has been promoting trade in its wastes for recycling, a high-risk process. Industrialized countries are introducing strict environmental standards requiring expensive pollution control equipment in secondary smelters, as well as high health and safety standards for workers. A combination of tighter regulations and a drop in domestic lead prices in the highly industrialized countries has resulted in the transfer of lead batteries and lead battery smelters out of these countries to developing countries.

Export of plastic residues containing hazardous substances

29. The export of plastic wastes represents a potential risk to life, health and the environment. The emission of large quantities of dioxin, the discharge of heavy metals such as lead and cadmium, and the incineration of cables coated in polyvinyl chloride (PVC) is banned in many developed countries, which nevertheless continue to produce large quantities of PVC wastes, particularly from cables. These are stripped down mechanically, whereupon the copper is sold and the plastic mixture is landfilled or incinerated. Because this process is expensive, cable waste is exported to developing countries, particularly in Asia, where factory workers are exposed to dangerous fumes generated by the incineration of cables containing PVC. Under European law, cable waste is on the "green list", i.e. among the non-hazardous products that may be exported to non-OECD countries for recycling. The recycling procedures in use are flawed and have serious environmental and health impacts.

Export of ships for recycling operations

30. The attention of the Special Rapporteur has been drawn as a matter of urgency to the endangering of life, health and the environment resulting from the export to Asia of old ships originating in OECD countries and contaminated by hazardous substances. Under the Basel Convention, ships destined for shipbreaking are wastes and, to the extent that they contain hazardous substances, are considered hazardous wastes (art. 2, para. 1). When such ships destined for shipbreaking perform a transboundary movement, they are subject to the Basel Convention (and other applicable regional treaty arrangements pertaining to the trade in hazardous wastes). In the case of ships that move from an OECD country to a non-OECD country, the Basel ban should apply. Moreover, under the Convention, a transboundary

movement from a State party to a shipbreaking yard in a non-OECD country is prohibited because the conditions in the shipbreaking yards do not constitute "environmentally sound management of hazardous wastes".[15]

31. The Basel ban is circumvented in practice. A transaction that involves sending a ship to a breaker's yard may fall outside the scope of the Basel Convention if the fact that the vessel is destined for shipbreaking can be concealed. If a transaction is limited to the sale of a ship, for example to a purchaser resident in a non-OECD country, and the ship is subsequently sent to a breaker's yard, upon arrival in that country no transboundary movement of "wastes" would appear to have taken place. This scenario illustrates a legal loophole which needs to be closed. There is also the problem of ships sailing under a flag of convenience.

(c) Export of waste-intensive industries

32. There appears to have been a growth in the transfer of polluting industries, industrial activities and/or technologies which generate hazardous wastes from OECD to non-OECD countries. The hazardous technologies exported to the South are generally those which have been discontinued or banned for environmental or health reasons, those which face major opposition from local governments or community and labour organizations, and those which have been replaced by safer technologies or are based on the manufacture, use or disposal of toxic persistent bioaccumulative compounds.

33. Hazardous technologies exported to developing countries are used in relation to asbestos-related industries, cyanide heap leaching and chlorine-related facilities in the chlor-alkali industry, marine disposal of mine tailings, manufacture of benzidine dyes and beta-Naphtylamine (an intermediate in the manufacture of dyes), and tanneries. The export of incinerators is another form of transfer.

(d) Pesticides and other chemical and pharmaceutical products

34. Despite the adoption of stricter international regulations and national legislation, the trade in pesticides and other toxic chemicals continues to flourish. Every year these products cause serious cases of poisoning and kill thousands of people. Many of these substances have a devastating impact on the environment, polluting water supplies and poisoning animals, plants and people. Stocks of pesticides and toxic chemicals are accumulating in nearly all developing countries. Most are persistent organic pollutants (POPs), extremely toxic chemicals with a very long natural life, which accumulate in the body.

35. Over the past decade, the pesticide industry has been moving its plants to developing countries. This transfer, usually in the form of redeployment carried out by transnational corporations, is often aided by national and international development agencies. In a number of reported cases, transnational corporations use these plants to produce pesticides that have been banned or severely restricted in industrialized countries. A number of products that have been withdrawn from sale, banned or severely restricted continue to be produced in those countries and freely exported to developing countries. Among these are certain pesticides and pharmaceuticals, asbestos and plastics containing PVC.

36. Other reports concern the illicit trade in pharmaceuticals. Most manufacturers of dangerous and non-effective drugs export their products without major obstacles. In 1990, 47 drugs which had been banned or withdrawn in the EC were still on the market in developing countries. These include painkillers such as flafenine, alclofenac, oxyphenbutazone and dipyrone, which were taken off the market because of their negative risk/benefit ratio. In one case, adulterated glycerine was exported and used to manufacture a drug that led to the death of at least 48 Haitian children.

B. Factors contributing to illicit traffic

37. Illicit traffic is encouraged by a number of legal, economic, social and political factors. Disparities in domestic legal standards between developed and developing countries have encouraged transboundary North-South movements of wastes and toxic products. Many industrialized countries have introduced stricter environmental standards and waste disposal legislation and made regional arrangements concerning transboundary movements. Since it is increasingly difficult and costly to treat and dispose of wastes in the country of origin, there is an incentive for companies to dump their waste products in countries where such legislation is lacking or where there is a shortage of human and financial resources to implement such legislation.

38. While industrialized countries generally possess stringent regulations on the sale of toxic and dangerous products and wastes on the domestic market as well as stringent waste management regulations, similar restrictions with regard to the export of such substances are either weak or absent. There is a lack of effective regulatory mechanisms at the international level, owing to ambiguities and loopholes which allow toxic waste trade arrangements to continue legally. The definition of wastes, the monitoring mechanisms and the arrangements for prosecutions and penalties are all inadequate to deal with illicit or dubious practices.

39. The liberalization and deregulation of international financial markets have created favourable conditions for the trade in toxic and dangerous products by easing the terms for the granting of licences and the other impediments to this trade. The liberalization and deregulation of the economies of developing countries, the centrepiece of the structural adjustment programmes imposed on debtor countries by the international financial institutions, have greatly facilitated the export of toxic and dangerous wastes to these countries.

40. Existing regulations do not address the generation of toxic and dangerous wastes in production processes and technologies, nor are they aimed at halting the production of these wastes. They emphasize pollution control or end-of-pipe technologies that merely serve to collect or concentrate the waste, which must then be disposed of somewhere. According to one author, "instead of reducing the risks of the generation of hazardous wastes, current regulations seem only to redistribute them geographically".[16]

41. Waste tends to move towards areas with weak or non-existent environmental legislation and enforcement. Many developing countries are unable to determine the nature of substances crossing their borders. Developing countries often lack adequately equipped laboratories for testing and evaluation and the requisite specialized data systems or information on the harmful characteristics of wastes. In a number of cases, offers made to developing countries by waste

traders either did not divulge vital information on the nature of the wastes, or the information was distorted; waste brokers mixed one toxic waste with others, or redefined the waste as resource "goods". Such handling and intermediate treatment also produce new waste streams.

42. The strengthening of national, regional and international provisions (particularly the amendment to the Basel Convention), including in developing countries, has helped to reduce the so-called "legal" forms of waste transfer, principally recycling operations. However, no country is immune from the fraudulent procedures resorted to by corrupt brokers and dummy corporations. A report of the United States Department of Justice observes that: "bribery and offers of employment at hazardous waste treatment, storage and disposal facilities were prevalent methods of manipulating public officials to meet offenders' ends. Moreover, hazardous waste generators and other environmental wrongdoers are increasingly using intermediaries and dummy corporations to shield their involvement in illegal disposal operations".[17]

IV. TRANSNATIONAL CORPORATIONS

A. Basic principles

43. In its resolution 1995/81 and subsequent resolutions, the Commission on Human Rights deplored the "growing practice of the dumping in African and other developing countries by transnational corporations and other enterprises from industrialized countries of hazardous and other wastes that constitute a serious threat to the human rights to life and health".

44. In considering the role and practices of transnational corporations, it is important to bear in mind the spirit of the Charter of Economic Rights and Duties of States, which provides that every State has the right "to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its laws and regulations and in conformity with its national objectives and priorities" (art. 2, para. 2 (a)) and "to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies" (art. 2, para. 2 (b)).

45. The Special Rapporteur would also like to draw attention to the report by the Secretary-General entitled "Preliminary set of basic policy guidelines on structural adjustment programmes and economic, social and cultural rights" (E/CN.4/Sub.2/1995/10).

46. Reference should also be had to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (General Assembly resolution 53/144 of 9 December 1998). Article 18, paragraph 2, of that resolution provides that "Individuals, groups, institutions and non-governmental organizations have an important role to play and responsibility in safeguarding democracy, promoting human rights and fundamental freedoms and contributing to the promotion and advancement of democratic societies, institutions and processes" and paragraph 3 that they also have a responsibility to contribute "as appropriate, to the promotion of the right of everyone to a social and international order in which the rights and freedoms set forth in the Universal Declaration of Human Rights and other human rights instruments can be fully realized".

B. Transnational corporations, toxic products and human rights

47. A background document prepared by the United Nations Secretary-General[18] states that the liberalization and deregulation of international markets, including financial markets, have increased the locational flexibility of transnational corporations and facilitated the movement of toxic and dangerous products and wastes across frontiers. Structural adjustment programmes imposed on debtor developing countries by the international financial institutions and requiring the liberalization and deregulation of their economies have created the conditions for easy entry into these countries of transnational corporations and other enterprises engaged in such activities.

48. Corporations trading in toxic and dangerous products and wastes find lucrative waste markets in poorer, less industrialized countries in economically depressed areas with serious problems such as poverty, unemployment, foreign indebtedness, conversion of production and the search for alternatives to declining industries provoked by falling demand on the world market. Poorer, heavily indebted countries are particularly vulnerable to external pressures, which can take the forms of promises of easily acquired foreign exchange in hard currency, employment creation, installation of enterprises for waste recycling and the transfer of new technologies.

49. The Special Rapporteur's attention was also drawn to the incalculable consequences for life, health and the environment resulting from trade in, and use of pesticides, especially in developing countries. Some 5 million tons of pesticides are released into the environment every year. Despite the adoption in 1998 of the Rotterdam Convention and the elaboration in many countries of national legislation regulating the export, import and use of pesticides, the situation in many Third World countries is still alarming because of the presence there of stocks of ageing pesticides. Moreover, pesticide use is rising strongly in such countries although they are not in a position properly to supervise the use of particularly dangerous products. Transnational corporations should, therefore, be held liable not only for the export, but also for the conditions of use of their products.

50. The above-mentioned background document also states that:

> "33. In their search for markets, transnational corporations export dangerous chemical products mainly from those countries where chemicals considered to be dangerous are banned. Despite an FAO code requiring that no pesticides in certain categories be exported, products subject to health and safety regulations in home countries continue to be sold in countries lacking such regulations or information on safe usage ... .
>
> 34. Other toxic chemicals transnational corporations use in their production process also cause health problems. For instance, transnational corporations manufacture most of the world's chlorine, which is used as a base for potentially harmful chemicals such as PCBs, DDT and dioxins; these chemicals can lead to birth defects as well as reproductive, developmental and neurological damage. Transnational corporations' involvement in the production and use of asbestos, volatile organic compounds and radioactive waste materials can also generate health problems."

51. The Special Rapporteur received communications alleging that Western enterprises do not apply in developing countries the standards in force in industrialized countries (working conditions of local employees; lower manufacturing and safety standards; chemicals banned in Western countries freely exported, or manufactured and used in wrong conditions; transfer of heavily polluting industries; clandestine export of hazardous wastes; export under the guise of gifts of expired drugs and other pharmaceuticals, etc.). Transnational corporations reject those allegations and try to improve their image. The Special Rapporteur was able to gauge, during her discussions in Germany with the Bayer corporation, the extent of the efforts that are now beginning to be made. Bayer spends more than DM 1 billion a year on dangerous wastes processing; its Leverkusen facility processes 45,000 tons of waste a year. Bayer's representatives stated that the company had reduced its waste output from 850 tons in 1981 to 766 tons in 1998 and that both the parent company and its foreign subsidiaries are making strenuous efforts to make their production processes environment-friendly. The corporation has adopted environmental protection guidelines[19] and applies in developing countries the standards that it demands of its operations in industrialized countries.[20] However, the Bayer representative stated with regard to the use of chemicals in lax safety conditions that the company did not believe that the improper use of chemicals in developing countries was the manufacturer's responsibility.

52. Information from other sources suggests that Western enterprises' statements must be treated with caution. The Special Rapporteur's attention was drawn to the situation on the ground, the existence of illicit trafficking in pesticides in the injury to life and health resulting from the improper use of these products in certain developing countries. Over 50 kinds of dangerous pesticides and organophosphorus compounds such as parathion methyl, mevinphos, methamidophos and monocrotophos have apparently been illegally exported. Of these products, Folidol and Thiodan are extremely dangerous pesticides manufactured by Western firms. According to the same sources, transnational corporations are attracted to countries where wages are low and/or labour and trade-union rights are poorly developed. In general, the corporations dump their waste in areas inhabited by people who are economically and/or politically weak and they recruit most of their workforce from among the poorest sectors of the population and migrant workers. When accidents happen, the victims rarely have any means of enforcing their rights and, where remedies do exist, they receive negligible compensation.

C. Outlook

53. In his statement on 31 January 1999 to the World Economic Forum in Davos, Mr. Kofi Annan suggested to business leaders that they should conclude a global compact with the United Nations to give a human face to the global market. He asked them to embrace, support and enact a set of core values in the areas of human rights, labour standards and environmental practices (see also the next paragraph).

54. The document from the Office of the High Commissioner for Human Rights entitled "Business and Human Rights: a Progress Report"[21] stresses the advantages that businesses would derive from a policy of concern for human rights. Upholding human rights would help in: (a) ensuring compliance with local and international laws and thus avoiding legal challenges, including the growing number of lawsuits, to business activities; (b) satisfying consumer concerns and avoiding campaigns highlighting allegations of human rights abuses; (c) promoting

the rule of law and a stable, corruption-free environment conducive to business development; (d) improving businesses' image; (e) enhancing risk management; (f) selecting well managed, reliable business partners that operate ethically; (g) increasing worker productivity and retention, and (h) keeping markets open.

55. Transnational corporations have begun to examine the repercussions of their activities on human rights and the environment by evaluating the context in which they operate and drawing up internal guidelines, or in some cases even codes of conduct, for application by themselves and their subsidiaries. Some firms have elaborated their own codes of ethics, while a number of groups of firms have begun to draft joint standards. In addition, Governments, non-governmental organizations, associations and other groups have drafted codes of conduct for use by businesses.[22]

56. The Special Rapporteur feels that transnational corporations cannot be entirely trusted spontaneously to comply with international standards; she has doubts about the value, scope and efficacy of rules set unilaterally by the corporations themselves. The first danger is that the negotiating capacity of developing countries seeking investment will be diminished; the second is that the proliferation of fragmented, contradictory rules will leave firms with numerous loopholes. Furthermore, there is a risk that standards of this kind will be contrary to universally recognized principles of human rights and labour and environmental law. Lastly, experience has shown that rules or codes that are not subject to international supervision are transgressed with impunity or ignored. That explains the importance of supporting the work in progress within the Sub-Commission on the Promotion and Protection of Human Rights, where a working group is studying the possibility of elaborating a code of conduct for transnational corporations based on the human rights standards.[23]

57. There must be no forgetting the Secretary-General's statement at the 2000 World Economic Forum, where he said that a way must be found of basing the global market on core values and the proposed global compact's nine principles in the areas of human rights, labour and the environment.[24]

V. HUMAN RIGHTS IMPACTS

A. General trends

58. The Special Rapporteur has received some 100 communications since her mandate was established. Some of a general nature have been summarized above. Others refer to specific cases and incidents; they are summarized in the addendum to this report (E/CN.4/2001/55/Add.1, chap. III). The cases and incidents in question concern infringement of the exercise and enjoyment of such fundamental rights as the right of peoples to self-determination and permanent sovereignty over natural resources, the right to development, the rights to life, health, adequate food and safe and healthy working conditions, freedom of expression, the right to form and join trade unions, the rights to strike and to bargain collectively, the right to social security and the right to enjoy the benefits of scientific progress and its applications.

59. The information provided concerning the practice of transnational corporations alludes to infringement of the right of peoples to self-determination and freely to dispose of their natural

resources, the right to development and the rights to life and health. The said practice also affects the right to satisfactory working conditions, freedom of association, the rights to form and join trade unions, the rights to strike and to bargain collectively, the right to social security and the right to enjoy the benefits of scientific progress and its applications.

60. Poverty and underdevelopment continue to be additional risk factors. Vulnerable groups, such as indigenous populations, peoples under foreign domination or occupation, women, children, refugees and migrant workers are in some cases targeted and in others the victims of discrimination as regards availability of remedies, proposed solutions or compensation.

B. Examples

1. Right to life and right to safe and healthy working conditions

61. The right to life is suprapositive. It is an erga omnes rule enforceable against anyone, even in the absence of a contractual obligation. It is one of the rules of jus cogens and thus one of the rights that, according to several human rights instruments, including the International Covenant on Civil and Political Rights, are non-derogable. It is, furthermore, a right concerning which the Human Rights Committee has said that it "should not be interpreted narrowly" and that States must take positive measures, including "measures to reduce infant mortality and to increase life expectancy".[25]

62. The enjoyment, in both the limited and the broad senses, of this right depends on the prevailing environmental conditions. The right to life is one of the first rights to be affected by the production, use, trading and temporary or final disposal, including dumping, of toxic wastes and products. The communications addressed to the Special Rapporteur almost all report violations of that right as manifested in instant death, serious damage to health (cancers and other incurable disorders), irreversible sterility, abortions, birth defects and major handicaps. As the following, non-exhaustive examples show, the right to life and the right to health are affected by the living and working conditions to which populations confronted by the problem of toxic waste are subjected:

(a) Even what can be considered "legitimate" forms of hazardous waste recycling, such as the reclamation of metals, can pose a serious threat to human health and the environment.[26] Recycling operations are more labour-intensive and generally less regulated. In fact, wastes for recycling may represent a greater threat to occupational health and safety than those destined for outright dumping because they are usually handled more. Moreover, hazardous waste recycling processes release into the environment hazardous residues and emissions in the form of new wastes or pollution. According to UNEP, "recovery operations or facilities for hazardous and other wastes can release toxic emissions or discharges to air, soil or water and as such represent a potential threat to human health and the environment".[27] In fact, the wastes thus produced are usually even more hazardous than the original wastes themselves: "residues arising from the recovery of hazardous wastes can be hazardous themselves, perhaps even more hazardous (toxic, poisonous, ecotoxic, etc.) than the original wastes due to higher concentrations of the hazardous constituents";[28]

(b) Lead recycling factories expose workers to serious occupational and health risks. People living and children attending school near battery recycling facilities are also victimized by this toxic trade. The consumption of lead-contaminated crops, plants and fish from lead-contaminated streams poses a serious threat to human health. Battery recycling plants have also been found to discharge other toxic contaminants which pose health and environmental dangers. These include arsenic, mercury, antimony, polyvinyl chloride (PVC) and sulphuric acid;

(c) A disturbing trend in the chlor-alkali industry to shift chlorine-related facilities to the developing countries has been reported. Approximately 70 per cent of the world's chlorine is produced in North America and Europe. Organochlorines are widely recognized as being highly toxic, causing a wide range of health effects in a broad array of species. Many organochlorines cause reproductive failure and infertility or birth defects. Some are known to disrupt the immune system. Many cause cancer. Virtually all damage the liver, kidneys, nervous system and other organs or systems;[29]

(d) The trend towards the transfer of polluting industries to developing countries places on those countries new burdens, such as the problem of disposing of hazardous wastes generated by these industries. The air, water and soil pollution caused by the processes used in these industries, as well as that caused by industrial disasters, poses great risks to the health, life and well-being of populations. Disasters such as have occurred in Bhopal and Chernobyl, to mention only two, have claimed many victims and displaced populations;

(e) WHO estimates that pesticides poison at least 3 million people annually and kill some 20,000.[30] The Special Rapporteur has received information about trade in pesticides such as chlordane and heptachlor (two carcinogenic chlorinated products) and parathion ethyl and organophosphorus (OP) pesticides, including parathion methyl, malathion and fenitrothion. OP pesticides have been substituted for dangerous organochlorine insecticides like DDT, but have not proven to be a safe alternative. According to the WHO/UNEP Working Group on the public health impact of pesticides used in agriculture, they have caused more human deaths than any other pesticides and have significantly increased the risks of ill health in developing countries; the Working Group estimates that the use of OP pesticides in developing countries will have doubled by the year 2000.[31]

63. The conference organized in Geneva in September 1999 by the Commonwealth Environmental Health Project and the International Joint Commission was an occasion for the presentation of information from recent scientific studies on the adverse health effects of persistent pollutants. Persistent organic pollutants (POPs) bioaccumulate and are easily transportable; they have a demonstrated capacity to affect human health. The conference placed special emphasis on the endocrine-disturbing impacts of POPs and on the broader emerging concept of POPs as "signal disrupters" that affect systems other than the endocrine system. Endocrine or signal disrupters can trigger a cascade of events in the developing foetus or the young child that can affect its neurological and immune systems. This damage may not appear for decades.

64. The Special Rapporteur received from an American non-governmental organization, the Multinational Resource Centre, a report according to which the World Bank and the

International Finance Corporation were encouraging the incineration of medical waste through more than 30 projects in some 20 countries. This method of disposing of waste is increasingly being abandoned by industrialized countries. Medical waste incinerators give off not only dioxins, among the highly toxic cancerous pollutants, but also mercury, which is harmful to health because it affects the nervous system, the brain, the kidneys and the lungs.

65. Other communications have stated that ships exported to developing countries to be broken up contain significant quantities of asbestos, polychlorinated biphenyls (PCBs), hydraulic fluids, paints containing lead and/or other heavy metals, tributylin or TBT antifouling coatings, contaminated holding tanks and other substances rendering them hazardous waste and extremely dangerous to human health and the environment when scrapped in the existing ship-breaking yards. The people employed to break up these ships work in conditions that are particularly dangerous for their lives and health, being exposed on a daily basis, both at work and at rest, to asbestos, dioxins and PCBs in paints, plastic products, felt gaskets, machinery mounts, adhesives and electrical cable insulation on board the ships. They also inhale dangerous substances when they demolish the ships' hulls using blowtorches or when they burn irrecoverable items in the open. Fungicide paints applied to the hull and lead-containing paint also represent a health hazard and a threat to the environment. It is estimated that at least one worker dies every day and that 25 per cent of the workforce develops cancer in the medium term. Others are killed by explosions caused by the ignition of flammable gases trapped within the ships.[32]

2. Racism and discrimination; rights of migrant workers, minorities and indigenous populations

66. The information and the specific cases brought to the Special Rapporteur's attention show that toxic wastes and products tend to be illicitly moved to, and dumped in developing countries or in regions where the population is poor, needy or the victim of discrimination. It is the most vulnerable groups that are the worst affected.

67. Discrimination on grounds of race or social, ethnic, political or cultural affiliation is aggravated by "environmental" discrimination, since the wastes are buried in developing countries and in zones inhabited by the needy, migrants, indigenous peoples or racial, religious, linguistic or other minorities. Moreover, these people are excluded from the decision-making and environmental-monitoring processes; they are generally unable to afford medical care or to sue or seek any other form of administrative or legal remedy.

68. The Special Rapporteur has been told that in one country inequality based on socio-economic and racial factors prevails regarding the right to a healthy environment: race is said to be one of the parameters from which the location of hazardous waste treatment facilities can be predicted.

69. Other communications concerned the activities of maquilladoras, enterprises located along the Mexican-United States border that have been accused of illegal dumping of toxic products and wastes in United States coloured communities, on Indian land and in developing countries, particularly Mexico. A project, fortunately abandoned, to build a nuclear waste dump

at Sierra Blanca (Texas) was seen as a form of environmental racism by the mainly Mexican population and by the inhabitants of the entire border zone; both those groups are economically disadvantaged.

70. The case of the banana plantation workers in Costa Rica who were sterilized by contact with dibromochloropropane (DBCP) is illustrative of the working conditions that transnational corporations offer to employees, most of whom are migrants or seasonal workers, and of the difficulties that employees encounter in obtaining fair compensation for injury to themselves and members of their families.

71. The Special Rapporteur received information from Greenpeace International and the World Wide Fund for Nature (WWF) on the adverse effects of persistent organic pollutants (POPs) on fauna and flora. The video cassette submitted by Greenpeace shows how the health of indigenous populations in several countries is affected by the presence of such pollutants in animals, fish and plants, on which those peoples' diet is based. Both unborn children and women's milk are affected and the reproductive capacities of men are reduced owing to the presence of dangerous chemical products in their food.

3. Right of association, freedom of information, rights of human rights advocates

72. In other instances, the right of association and freedom of information have been ignored or severely restricted, hindering in particular the action of associations seeking to prevent toxic waste dumping, to enforce their rights and to mobilize the human and financial resources needed to deal with the problem. Communications received by the Special Rapporteur speak frequently of violation of the right to information. Generally speaking, in the absence of information the basic problem remains hidden until there has been an incident having serious repercussions on human life and health and causing irreversible environmental damage. When the incident has occurred, information of vital importance to the victims and their defence is either withheld, falsified, or provided late, in dribs and drabs or in such a way as to be unusable. Exercise of the right to disseminate information is also impeded. Governmental authorities justify this on national security grounds and transnational corporations by considerations of commercial secrecy.

73. Mention must be made of the important opinion that the Working Group on Arbitrary Detention rendered on 20 May 1999 in the case of Mr. Grigorii Pasko, a 38-year-old commander in the Russian navy, who was imprisoned in 1997 for spying, high treason and disclosure of State secrets. The Working Group held that freedom of environmental criticism is part of the right to freedom of expression and that "the deprivation of liberty of Grigorii Pasko was arbitrary". It considered that: the accusations of spying had no grounds beyond Mr. Pasko's dissemination of information on environmental protection; damage to, or protection of the environment are issues that know no boundaries, especially where radioactive pollution is concerned; consequently, it should be possible freely to engage in ecological criticism, which forms part of the right to freedom of expression "regardless of borders", as laid down by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights.

C. Victims, impunity and corruption

74. Examination is beginning of the question of impunity and of that of the right of victims to restitution, compensation and rehabilitation, and these issues have been the subject of a number of studies by human rights bodies.[33] This is therefore an area which merits further, in-depth research. The problem of toxic waste is not made any easier by the difficulty of determining who is liable for damage resulting from transboundary, transnational activities. Such activities may involve a variety of actors: States, companies, and sometimes intermediaries, who may be physical persons, hidden companies or subsidiaries with numerous offshoots. The difficulty of apportioning blame may be compounded by fraudulent manoeuvres. It is hard to determine the causal relationship between fault and injury to unidentified or unidentifiable victims, victims who, under current law and procedures, have no suitable remedies. And, in the few cases where appeals have been filed and held valid, the compensation awarded has, because of the lack of criteria and of the unequal relationship between the authors and victims of the injury, been far from equivalent to the loss and damage suffered.

75. Among the obstacles to the suppression of illicit trafficking identified in a report to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders are corruption, falsification of documents and the difficulty of tracing networks to their origins. The report observes that "there is a great temptation for producers to lure poor, cash-strapped countries to import such wastes by providing attractive financial inducements and even by bribing officials. Transport documentation, laboratory analyses and consent documents are often doctored by shippers and transporters, thus escaping scrutiny by customs and border officials". There are also more serious obstacles, such as the difficulties in detecting, investigating and tracking vessels sailing the oceans and vehicles crisscrossing international borders.[34]

76. The report by the United States Department of Justice quoted above states that the impediments to successful prosecution for environmental offences include bribery of public officials, use of intermediaries and dummy corporations to shield involvement in illegal waste-disposal operations, and dilatory trial practices.[35]

77. National and international instruments frequently ignore the victims' point of view. Appeal procedures are far from effective or efficient. The Basel Convention and national legislation consider illicit trafficking in toxic waste a criminal act subject to civil, administrative and criminal proceedings. In practice, the wrongful acts go unpunished, even when a formal complaint has been filed, because of the difficulty of identifying all the links in networks, detecting the origin of the waste or products and attributing responsibility. In most cases, the entities involved in trafficking are national or transnational companies. In the absence of clear, generally recognized rules about corporate liability, it is difficult to bring legal proceedings against firms and above all difficult to make the charges stick. Moreover, companies operating in developing countries benefit from laws that are less strict than in their home State.

78. As the Special Rapporteur has already recommended, States should take their lead from the provisions of the Council of Europe's Convention for the protection of the environment through criminal law of 4 November 1998. That instrument recognizes the criminal liability of

physical and juridical persons for environmental damage. Transnational corporations should be obliged to observe the laws of the countries where they operate and, if necessary, the laws of their home country if they are stricter.

79. National commissions of inquiry, besides being too rarely set up, often overlook victims' plight and the question of compensation.

80. Another problem is that of identifying victims and of establishing the causal link between the offence and the damage suffered. Often, workers who are exposed to a harmful product are only short-term employees (usually seasonal or migrant workers) and leave the firm or the manufacturing site before the harmful effects become apparent. Typically, after being laid off, they scatter and it is then that they suffer, unaware of their rights, health problems of which they do not realize the source. Later on, they find themselves carrying a difficult burden of proof if they wish to enforce their rights.

81. When appeals are made, victims or their successors come up against the obstacle of delaying tactics. They have to cope with floods of expert reports, second opinions and technical data and the problems of establishing a clear and immediate link between the offence and their injury. They fall prey to unscrupulous lawyers who sometimes strike compromises detrimental to their clients' rights or demand fees that substantially reduce the real value of any compensation that may be won.

82. Victims are encouraged to accept, in return for derisory financial compensation, deals that result in the stifling of civil and criminal proceedings alike. Many prosecutors and judges are reluctant to prosecute and sentence businessmen and companies for environmental crimes. In such circumstances, it is important that victims should have access to counsel and the right to be represented and/or assisted by associations.

83. The codification of law undertaken by United Nations bodies must continue. Defence of the rights of victims of human rights violations, including their procedural rights and rights relating to breach of the right to a healthy environment, must be assured. Mention may be made in this respect of the work of the United Nations Interregional Crime and Justice Research Institute (UNICRI), which is developing a research project on organized transnational crime. The Sub-Commission on Prevention of Discrimination and Protection of Minorities has been seized of a number of draft proposals, including proposals for basic principles and guidelines on the rights of victims,[36] principles relating to the human rights conduct of transnational corporations[37] and principles on human rights and the environment.[38]

VI. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

84. The majority of the world's toxic pollution is produced in OECD countries, which generate more than 95 per cent of all hazardous waste, the principal waste-exporting countries being Germany, the Netherlands, the United States of America, the United Kingdom and

Australia. In the 1970s, stricter waste-disposal legislation was introduced in many industrialized countries, thereby increasing the costs of treating and disposing of waste in the country of origin. The search for outlets in less industrialized countries engendered transboundary movement of wastes.

85. In the 1980s, Africa was the first victim of toxic waste export schemes. However, the alerting of public opinion, the mobilization of African countries and the establishment of import bans through the Bamako and Lomé international conventions forced companies to seek outlets in other regions. From 1989, exports went to Latin America and East and South-East Asia. Several Latin American Governments have now prohibited the import of wastes and a regional agreement has been concluded. The African and Central American regional agreements ban import of radioactive waste as well as of hazardous products such as asbestos or unregistered pesticides. In recent years, many countries have introduced import bans: countries with such bans numbered only 3 in 1986, but 33 in 1988, 88 in 1992 and 107 in 1995.

86. Despite the developing countries' efforts, international movements of wastes increased owing to the proliferation of waste "recycling" programmes enabling waste producers to circumvent the ban introduced by the 1989 Basel Convention. In 1995, the States parties to that Convention adopted an amendment banning exports of hazardous wastes, including waste for recycling, from OECD to non-OECD countries. The genuine and supervised application of that ban should lead to a decrease in major transfers of waste from OECD countries to non-OECD countries. According to information from the European Environment Information and Observation Network (EIONET),[39] the European Union countries and Norway have reported to the Basel Convention that very little hazardous waste, namely 5,802 tons, or 0.4 per cent of a total of 1,472,289 tons, is exported to non-OECD countries and that most goes to India, New Caledonia or Kazakhstan. EIONET states that, if those figures are accurate, the European Union, which decided in 1998 to comply with the Basel amendment, will have no difficulty in respecting the ban on export of waste for recycling to non-OECD countries.

87. Another dimension of the problem is the transfer of polluting industries, industrial activities and technologies which generate hazardous wastes. The transfer of "dirty" industry from OECD to non-OECD countries is reported to have increased. A number of products that have been banned, withdrawn from sale, severely restricted or not approved in industrialized countries continue to be produced and freely exported to developing countries. The most alarming cases concern intensive, uncontrolled use of chemicals, toxic agricultural products and persistent organic pollutants.

88. A combination of factors of legal, economic, social and political character are contributing to the emergence and expansion of movements of hazardous wastes and products from industrialized to developing countries. Among these are disparities in domestic legal standards between developed and developing countries, the absence of effective international regulatory mechanisms, as well as ambiguities in international instruments and difficulties faced by developing countries in enforcing their domestic law and international legislation.

89. Trade liberalization and deregulation of international financial markets have also helped to create conditions conducive to the development of trade in toxic and dangerous products and

wastes. African countries and other developing countries continue to be the principal victims of such practices, while recent information speaks of the Baltic States, Russia, Ukraine, Georgia, Slovenia, Romania, Poland and Albania as new target countries for waste exports.

90. The risk of illicit trafficking has not been eliminated. Waste traffickers resort to fraud and corruption. The businesses involved use shell companies. Waste of which the export is banned is disposed of as material for recycling or through bogus development projects. Among the new aspects of the problem is the export of contaminated ships to be broken up in Asia. At least one case is known in which humanitarian assistance was used as a cover for an attempt to export hazardous products from a rich to a poor country. There have also been reports that trafficking in toxic products is linked to trafficking in arms, nuclear material or drugs, suggesting that there exist international trafficking networks with particularly dangerous ramifications.

91. The communications received by the Special Rapporteur highlight the negative impact such practices have on the fundamental rights set forth in the principal human rights instruments. They also refer to the difficulties that victims have in obtaining justice and reparation.

92. In concluding, the Special Rapporteur would like to repeat what the United Nations Secretary-General has said concerning globalization, namely that this seemingly irreversible and unavoidable process, a source of wealth for some, must not be synonymous with exclusion, exploitation, perhaps even destruction for others.

B. Recommendations

93. The Special Rapporteur reiterates the appeal made in the Vienna Declaration and Programme of Action and restates the objectives adopted in the framework of Agenda 21 concerning the prevention of the illegal transboundary movement of toxic and dangerous products.

94. The capabilities of the secretariats of the universal and regional conventions should be strengthened and States should be encouraged to ratify those instruments and cooperate fully in applying them.

95. Domestic and international regulations would be ineffectual without effective control and implementation mechanisms. The promulgation of strict laws to control transboundary movement of hazardous wastes should be continued, so as to reduce the differences between the standards applied in developed and developing countries and thus combat the new illicit trafficking patterns.

96. Developing countries' capacity needs to be strengthened through financial assistance, transfer of appropriate technology, provision of analytical laboratories, assistance in setting up national databases, establishment of regional and international data and information exchange centres, assistance in the educational sphere, and training for professionals in the areas of health care, environment, trade, customs, the police, anti-fraud operations and the judicial system.

97. Mutual legal assistance and exchange of information should be facilitated to counteract fraud and corruption in producer countries, importing countries and transit countries alike.

Regional and international cooperation in combating organized trafficking networks should be encouraged. Developing countries should be helped to obtain the necessary information on illicit trafficking, in which regard there is a need to establish early warning systems, as well as databases accessible to the developing countries containing information on: the nature of hazardous products and toxic wastes; the enterprises engaging in unlawful practices; any organized networks that are detected.

98. Governments should pass legislation that will prevent the scourge of illicit trafficking and includes deterrent measures, including administrative, civil and criminal penalties for individuals, enterprises and transnational corporations involved in it.

99. Illicit trafficking in toxic waste and hazardous products is a crime under the Basel Convention and the Bamako Convention. States should take appropriate steps to make unlawful acts connected with illicit trafficking in such waste and products crimes under their own law. They should consider providing for the prosecution of juridical persons and for the imposition of criminal penalties on enterprises on whose behalf one of their organs, a member of one of those organs or any other representative commits an offence linked to illicit trafficking in waste.

100. Transnational corporations should, as a minimum, comply with the laws of the importing country. When necessary, they should be held accountable for their actions and practices under the law of their home country if its environmental standards are stricter. Transnational corporations' home countries should help affected countries bring proceedings against, and punish, including through criminal penalties, the perpetrators of offences.

101. Model laws and regional arrangements could be proposed to Governments which so wished.

102. Victims should have access to administrative and judicial proceedings in the exporting State. Non-resident victims should have the same remedies and receive the same treatment as residents.

103. The Special Rapporteur calls for an international code of conduct to be elaborated for transnational corporations on the basis of the relevant human rights standards and the nine principles relating to human rights, labour and the environment of the global compact proposed by the United Nations Secretary-General.

104. Human rights bodies must remain vigilant for rights violations associated with the activities of multinational corporations, toxic wastes and other environmental problems. Supervisory mechanisms should be strengthened and codification efforts continued.

105. Independent national commissions of inquiry endowed with judicial or quasi-judicial powers should be established in alleged cases of illicit transfer or attempted illicit dumping of toxic waste.

106. The role of non-governmental organizations, local communities and associations, trade unions, workers and victims should be strengthened. Freedom of expression, the right of association and legal remedies should be consolidated.

Notes

[1] Commitment 4 states: "We commit ourselves to promoting social integration by fostering societies that are stable, safe and just and that are based on the promotion and protection of all human rights, as well as on non-discrimination, tolerance, respect for diversity, equality of opportunity, solidarity, security, and participation of all people, including disadvantaged and vulnerable groups and persons." (A/CONF.166/9, chap. I, resolution 1, annex I).

[2] See C. Hitz and M. Radka, "Environmental negotiation and policy; the Basel Convention on transboundary movement of hazardous wastes and their disposal", International Journal of Environment and Pollution, vol. 1, No. 1/2, 1991, p. 55.

[3] See A.E. Fry, "International Transport of Hazardous Waste" in Environmental Science and Technology, 1989, p. 509; see also the report of the Special Rapporteur: "Human rights and the environment" (E/CN.4/Sub.2/1994/9 and Corr.1).

[4] See H. Yakowitz, "Global Hazardous Transfers" in Environmental Science and Technology, 1989, p. 540.

[5] See the Greenpeace file "Database of Known Hazardous Waste Exports from OECD to Non-OECD Countries, 1989-1994", presented to the Second Conference of the Parties to the Basel Convention. See also S. Rublack, "Fighting Transboundary Waste Streams: Will the Basel Convention Help?" in Verfassung und Recht in Ubersee, 1989, p. 367.

[6] See C. Hitz and J.R. Ehrnefeld, "Transboundary movement of hazardous wastes. A comparative analysis of policy options to control the international waste trade", Environmental Affairs, vol. 3, 1991, p. 29.

[7] See fact-file compiled by Centre Europe-Tiers Monde (CETIM), "Nos déchets toxiques, l'Afrique a faim: v'là nos poubelles", 1989. See also Pambou-Tchivounda, "L'interdiction de déverser ses déchets toxiques dans le tiers monde; le cas de l'Afrique", Annuaire français de droit international, 1988, p. 709.

[8] CETIM, loc. cit.

[9] See Principle 21 of the Stockholm Declaration; General Assembly resolution 36/166 dated 16 December 1981; and the "Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes" (UNEP/GC/14/17, annex II).

[10] For a legal appreciation of the Bamako Convention, see Fatsah Oughergouz, "La Convention de Bamako ..." in Annuaire français de droit international, vol. xxxviii, pp. 871-884, Paris, Editions du CNRS, 1992.

[11] See Greenpeace, Toxic Trade Update, No. 6-4, 1993, p. 26.

[12] Greenpeace, The International Trade in Wastes, Washington D.C., several editions, 1988-1989.

[13] UNEP, "Guidance Document on Transboundary Movements of Hazardous Wastes destined for Recovery Operations" (UNEP/CHW.3/17, May 1995, para. 40).

[14] "Illegal traffic in toxic and dangerous products and wastes" (A/44/362 and Corr.1, para. 9).

[15] See the document prepared by Greenpeace and Basel Action Network, "Shipbreaking and the Basel Convention - An Analysis", 12 April 1999.

[16] C. Bongaerts, "Transfrontier movements of hazardous wastes", Berlin, Wissenschaftszentrum,1988.

[17] National Institute of Justice, "Local prosecution of environmental crime", United States Department of Justice, June 1993, p. 5.

[18] The relationship between the enjoyment of human rights, in particular, international labour and trade union rights, and the working methods and activities of transnational corporations (E/CN.4/Sub.2/1995/11).

[19] The guidelines are the following: "All employees bear responsibility for ensuring that the company's environmental protection objectives are achieved. Environmental protection does not only mean complying with laws and regulations. All employees are called upon to take supplementary measures on their own initiative. Production facilities must be operated in such a way as to ensure the safe handling of products and wastes. Production processes must be constantly reviewed and, where possible, improved to minimize raw material and energy inputs, emissions and waste generation. Waste material must be reusable, recyclable or capable of environmentally safe treatment and disposal. In-process waste-reduction methods should be given preference over end-of-process treatment or disposal". See report on the Special Rapporteur's mission to Germany and the Netherlands (E/CN.4/2000/50/Add.1, para. 52).

[20] Ibid., para. 53.

[21] Document available, in English only, on the Web site of the Office of the High Commissioner for Human Rights (http://www.unhchr.ch).

[22] See "Principles relating to the human rights conduct of companies - Working paper prepared by Mr. David Weissbrodt" (E/CN.4/Sub.2/2000/WG.2/WP.1).

[23] See "Report of the sessional working group on the working methods and activities of transnational corporations on its first session" (E/CN.4/Sub.2/1999/9, 12 August 1999) and the working group's subsequent reports.

[24] The principles to which businesses are asked to adhere in the global compact are:

Human Rights

Principle 1: Support and respect the protection of international human rights within their sphere of influence.

Principle 2: Make sure their own corporations are not complicit in human rights abuses.

Labour

Principle 3: Freedom of association and the effective recognition of the right to collective bargaining.

Principle 4: The elimination of all forms of forced and compulsory labour.

Principle 5: The effective abolition of child labour.

Principle 6: The elimination of discrimination in respect of employment and occupation.

Environment

Principle 7 Support a precautionary approach to environmental challenges.

Principle 8: Undertake initiatives to promote greater environmental responsibility.

Principle 9: Encourage the development and diffusion of environmentally friendly technologies.

[25] See General Comment No. 6, article 6 (sixteenth session, 1982), paras. 1 and 5, in "Compilation of general comments ..." (HRI/GEN/1/Rev.4 (Part II)).

[26] See A. Bernstorff and I. Kruszewska, "Hazardous waste trade in Poland 1988-1994", Greenpeace International, 11 October 1994; A. Bernstorff et al., "Russia: the making of a waste colony", Greenpeace, 25 November 1993; M. Cobbing, Lead, Astray: The Poisonous Lead Battery Waste Trade, Greenpeace, Recycling Series Case Study No. 5, second edition, 21 March 1994; F. Kockott, Wasted Lives: Mercury Waste Recycling at Thor Chemicals: Greenpeace, Recycling Series Case Study No. 4, 21 March 1994.

[27] UNEP, "Guidance Document ..." (see supra, note 13), para. 65.

[28] Ibid., para. 66.

[29] Greenpeace, Toxic Trade Update, No. 6-3, 1993, p. 27.

[30] Public Health Impact of Pesticides Used in Agriculture, Geneva, World Health Organization, 1990.

[31] Ibid.

[32] Sources: Greenpeace and Basel Action Network.

[33] See the three studies by Mr. Theo van Boven, the Sub-Commission's former Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, which contain the three versions of the basic principles and guidelines concerning reparation to victims (E/CN.4/Sub.2/1993/8, 2 July 1993; E/CN.4/Sub.2/1996/17, 24 May 1996, and E/CN.4/1997/104, 16 January 1997). See also the report by Mr. Cherif Bassiouni, independent expert of the Commission on Human Rights, on the same topic (E/CN.4/1999/65, 8 February 1999). Reference may also be had to documents including the reports on the question of impunity prepared respectively by Mr. Guissé and Mr. Joinet (E/CN.4/Sub.2/1993/6) and Mr. Guissé (E/CN.4/Sub.2/1997/8).

[34] "Background paper for the workshop on environmental protection at the national and international levels: potentials and limits of criminal justice" (A/CONF.169/12, paras. 69-71).

[35] See note 17 above.

[36] See note 33 above.

[37] See notes 22 and 23 above.

[38] See annex I of the final report on human rights and the environment by Mrs. Fatma Zohra Ksentini, Special Rapporteur (E/CN.4/Sub.2/1999/9).

[39] See www.eionet.eu.int.